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Supreme Court, U.S.
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No. 99-1867

IN THE

Supreme Court of the United States

N.T. BROTHER GREENE,

Petitioner,

v.

WILLIAM HACKETT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The Petitioner asks this Court to hold that the District Court be required to appoint an attorney or provide notice of time to appeal to a *pro se* litigant in districts that do not provide such notices. Petitioner's case was dismissed not because of failing to have notice of when to appeal. Petitioner's case was dismissed because of his failure to follow direct and clear court orders to amend his complaint. Only after numerous warnings and the subsequent failure to amend did the need to appeal arise.

Supreme Court Rule 10 states that review by the United States Supreme Court shall be granted only for compelling reasons such as when:

> [A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

This case does not involve such conflicting rulings which would necessitate review by the Supreme Court. The rules governing when to file a notice of appeal are uniform throughout all of the United States Circuits. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure states that notice of appeal ". . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

The only post-judgment notice of appeal filed by the Petitioner was on May 13, 1998, 113 days after the January 20, 1998 dismissal of his case.

Furthermore, Respondents were never properly served nor was service ever waived. Rule 4(d) and 4(e) of the Federal Rules of Civil Procedure require that service be by hand delivery or mail with written waiver of service. No respondent ever signed for the mailed summons and complaint and no respondent ever waived service, therefore the default judgment was in error and was properly set aside.

Not only is Petitioner's case procedurally invalid but it is also substantively invalid. Petitioner committed a criminal contempt in the presence of Judge Hackett and therefore was properly jailed. Furthermore, Petitioner fails to identify and specific policy or practice of the Respondents which led to a civil rights violation as required under 42 U.S.C. § 1983. Petitioner's case is procedurally and substantively invalid and the Petition should be denied.

I.

THE RULES GOVERNING WHEN TO FILE A NOTICE OF APPEAL ARE UNIFORM AMONG ALL UNITED STATES CIRCUIT COURTS

The thirty day time limit for appealing as of right under Rule 4(a) of the Federal Rules of Appellate Procedure is national, mandatory, and jurisdictional. Its purpose is to set a definite point of time when litigation shall end, unless within that time prescribed application has been made, and, if it has not, to advise prospective appellees that they are free of the appellant's demand. *Browder v. Director, Dep't*

of Corrections, 434 U.S. 257, 98 S. Ct. 556, 54 L. Ed. 2d 521, *reh. den.*, 434 U.S. 1089, 98 S. Ct. 1286, 55 L. Ed. 2d 795 (1978); *Donlin v. Watkins*, 814 F.2d 273 (6th Cir. 1987); *McConnell v. Barker*, 504 F.2d 1110 (6th Cir. 1974). Rule 4(a)(5) reads in pertinent part,

> The district court may extend the time to file a notice of appeal if a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and that party shows excusable neglect or good cause.

Petitioner first purported to file an appeal of an interlocutory order on January 12, 1998. (Pet. App. 24.) The Judgment of the District Court case was entered January 20, 1998. (Pet. App. 26.) Following dismissal of the interlocutory-order appeal on May 1, 1998 (Pet. App. 28), Petitioner filed back in District Court a Motion to Extend Time to file his appeal. (Pet. App. 30.) This was filed May 13, 1998, some four months after the District Court Judgment. (Pet. App. 30.) The District Court found that no excusable neglect or good cause existed that would justify extending the time to file an appeal. Moreover, Petitioner did not state *any* reason for the motion to extend time. The Court ruled that, in any event, the motion was well outside the time limit as provided by Rule 4(a) of the Federal Rules of Appellate Procedure, and therefore the Court lacked jurisdiction to make such an extension order. (R. 90, Order on Motion to Extend Time to File This Appeal to the Sixth United States Circuit Court.)

Rule 4(a) of the Federal Rules of Appellate Procedure is a uniform rule for all federal circuit courts. The rule does not vary from circuit to circuit. Because Petitioner's notice

of appeal filed on May 13, 1998, was outside of the time limit prescribed by the rule, the court had no jurisdiction over the case and it was correctly dismissed.

II.

THE PETITION IS NEITHER PROCEDURALLY NOR SUBSTANTIVELY VALID

The Petitioner portrays his case as one that was unjustly dismissed, an appeal that was unfairly denied, and one worthy on both procedural and substantive grounds. In reality, Petitioner's case was dismissed because of willful failure to follow repeated, detailed orders to file an amended complaint. Regarding the initial default order in this case, Respondents had never been properly served and service was never waived, therefore the default was properly set aside. Further, the default judgment set-aside, from which Petitioner made an interlocutory appeal, was untimely since an order setting aside a default judgment is not an appealable order. *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1028 (9th Cir. 1987, *cert. den.*, 485 U.S. 905 (1988). But not only is Petitioner's case procedurally flawed. It is also substantively flawed. Petitioner committed contempt in the presence of the Court and was properly jailed. Petitioner cited no policy or procedure of the county government at issue, as required to state a claim against a local government entity under federal civil rights law. For these reasons, this petition should be denied as it does not meet the criteria for Supreme Court review as stated in Rule 10 of the Rules of Supreme Court.

A. Petitioner Failed to Obtain Relief Because His Case Was Dismissed for Failure to Follow An Order to Amend, Not Because of a Faulty Appeal.

On October 21, 1997 the District Court ordered the Petitioner to amend his complaint and told the Petitioner step-by-step the kind of allegations that would be needed to set out a claim, what kind of paper to file the amendment on, and to sign it and send a copy to Respondent's attorney. (Pet. App. 18.) The court also prohibited the Petitioner from filing any more papers until permission was granted by the Court, after he filed the amendment. *Id.* The Petitioner never filed an amendment as directed by the court. Yet, over the next three months he did file four motions and two other documents with the court. (Pet. App. 20, Motion Requesting Appointment of an Attorney; Motion to Recuse; Motion for a Hearing; R. 22, Response to an Order; Pet. App. 24, Notice of Appeal [interlocutory] appealing the default set-aside, R. 11.)

The court warned Petitioner repeatedly that failure to comply with the orders would result in dismissal, "Failure to comply with these requirements, or any other order of the Court, may result in this case being dismissed without further notice." (Pet. App. 19.) The Court eventually ordered petitioner to show cause why the case should not be dismissed specifying that filing an amendment would suffice as a response. (R. 18.) On November 10, 1997 the Court even granted the Petitioner an extension of thirty days to file his amended complaint. (Pet. App. 22-23.) Petitioner never complied. (Pet. App. 26-27.)

Despite numerous orders of the Court and a thirty day extension, the Petitioner still ignored the Court's order.

For that reason, the Petitioner's case was dismissed with prejudice for failure to prosecute or show cause why it should not be dismissed. The Court relied upon *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991), and stated that, " '. . . dismissal is appropriate when a *pro se* plaintiff fails to comply with readily comprehended court deadlines.' " (Pet. App. 27.) Therefore even a successful appeal before this Court and remand to the lower Courts would not aid Petitioner, who allowed his case to be dismissed below by wilfully failing to heed numerous Court orders.

B. Petitioner Had No Valid Claim to Appointment of Counsel.

Petitioner states that if the court would not give a notice concerning the time to appeal then an attorney should have been provided for him. However, "It is well settled that in civil actions the appointment of counsel should be allowed only in exceptional cases. And, it is inappropriate to request an attorney to serve a plaintiff whose likelihood of success in his action is highly dubious." *Willett v. Wells*, 469 F. Supp. 748, 751 (E.D. Tenn. 1977) (several citations omitted). The *Willett* Court denied appointment of counsel for a "plaintiff [who] does not appear to be in more exceptional circumstances than most state prisoners who undertake to hail into court everybody connected in any way with that prisoner's conviction of crime in an effort to collect money damages form them," and suggested it would be appropriated to dismiss that plaintiff's claims a frivolous and malicious.

In *McMath v. Alexander*, 486 F. Supp. 156, 157 (M.D. Tenn. 1980), the Court denied appointment of counsel to an indigent prisoner in a civil suit even thought the complaint "set forth the nature of their claims quite clearly," because the allegations simply did not raise any constitutional basis.

Although Petitioner is not a convicted prisoner, the analysis parallels in every other respect. As the District Court found, Petitioner's circumstances are not exceptional. (Pet. App. 23). The Court had already advised Petitioner step-by-step on the procedure and types of allegations necessary for amending his complaint. (Pet. App. 18). The Court dismissed a number of his allegations as failing to state a constitutional claim, and labeled each as "frivolous." (Pet. App. 9, 15, 17). This is not a proceeding *in forma pauperis* as in 28 U.S.C. § 1915(e). Petitioner does not claim to be indigent; on the contrary, he alleges to have paid all or part of $5000 to an attorney (not his current counsel) to prosecute this claim, but the attorney did nothing. He approached a number of attorneys, none of whom would take the case. (Pet. App. 20). The record supports no grounds for appointment of an attorney. Denial of appointed counsel was appropriate and no valid argument to the contrary may be found in existing law.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this honorable Court deny the Petition.

Respectfully submitted,

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